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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Review of the Pioneer's)
Preference Rules)
)
TO: The Commission)

ET Docket No. 93-266

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF THE
SECRETARY

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**REQUEST FOR SEPARATE AND EXPEDITED TREATMENT
OF "EXISTING PIONEER PREFERENCE" ISSUES**

AMERICAN PERSONAL COMMUNICATIONS

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SUMMARY

American Personal Communications ("APC") asks the Commission to provide early and separate treatment of the issue of whether the Commission will apply any repeal or amendment of its pioneer preference policy retroactively to broadband PCS pioneer preference applicants. APC, other applicants, and the public that is being deprived of early service all are injured by the continuing delay in finalizing PCS pioneer preferences. This injury can be mitigated only by an expeditious decision on the retroactivity issue.

The narrow and specific retroactivity issue is independent of and severable from the broad, general policy questions that underlie any decision to modify or eliminate the preference policy prospectively. The four major points that compel a decision not to apply rule changes to broadband PCS applicants are entirely independent of all prospective issues. First, reneging on the preference policy on which broadband PCS innovators relied would be unjust and unlawful. Second, the premise for reconsidering the preference policy is inapplicable to broadband PCS. Third, the Commission's decision to effectuate preferences for narrowband PCS but consider denying preferences to broadband PCS is arbitrary and based wholly on timing decisions that were in the Commission's sole control. Fourth, the unjustified and twelfth-hour delay in finalizing broadband PCS preferences violates the Commission's own rules and is causing injury to deserving innovators and the public.

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This rule making addresses two discrete sets of issues.^{1/} First, the Commission is considering whether prospectively to abolish, modify or continue its pioneer preference policy for future services. Second, the Commission seeks comment on "whether any repeal or amendment of our [pioneer preference] rules should apply" retroactively to certain pioneer preference awards that it initially granted, including the tentative pioneer preference grant for broadband PCS that the Commission issued to American Personal Communications ("APC")^{2/} 12 months ago.

The pros and cons of the overall pioneer preference policy, and the various options for prospectively modifying that policy set forth in the Notice, may take some time to evaluate. No one will be hurt by the Commission's taking

^{1/} Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, FCC 93-477, p. 9 (Oct. 21, 1993) (the "Notice").

^{2/} American PCS, L.P., d/b/a American Personal Communications ("APC"), a partnership of APC, Inc. and The Washington Post Company.

three months to resolve these issues. In contrast, the case for acting on the broadband PCS pioneer preference applications is focused and compelling.^{3/} They can and should be promptly resolved because pioneer preference applicants and the public are being substantially hurt in the meantime.

APC urges the Commission to resolve the narrow retroactivity issue in a First Report immediately after the filing of comments and reply comments in this docket.^{4/} If extra time is needed to consider prospective issues, the Commission should resolve those issues in a Second Report, and any extensions should be considered only for prospective issues. No party would be prejudiced by this procedure, and prompt grant of broadband PCS preferences would make possible early service to the public in the affected markets, create jobs, encourage investment, induce manufacturers to expedite equipment implementation, and provide a valuable empirical experience for subsequent PCS operations nationwide.

* * *

There are four major points that compel the Commission to avoid retroactive application of pioneer preference rule changes. Each of these points is independent of the prospective issues that the Commission will consider:

^{3/} Only three paragraphs of the 26-paragraph Notice are devoted to these applicants, in what the Commission calls the "existing pioneer preference" issues.

^{4/} In this regard, we are grateful that the Commission set early filing deadlines in this proceeding.

1. Reneging on the preference policy on which the broadband PCS innovators relied would be unjust and unlawful.

Broadband PCS innovators, responding to the Commission's offer of preferences, poured their vision, their guts, their money and their genius into the development of PCS. Their contributions were made on the promise and strength of the Commission's preference policy, and American PCS is undeniably better as a result. PCS will be launched more quickly, more cheaply and in a more advanced state, will serve more people, and will generate more jobs and greater export opportunities. The efforts of PCS pioneers have enhanced the prospects for substantial auction revenues, because these innovators' solutions to technological and other issues permitted PCS to go forward where it otherwise might have been thwarted. Pioneers also have demonstrated the scope of consumer demand and the feasibility of the business, creating an industry and an investment community that will make substantial bids for licenses to provide its services.

The Commission induced this expenditure of financial (perhaps as much as half a billion dollars' worth) and human resources by its adoption of a pioneer preference policy.^{5/}

^{5/} See Omnipoint Communications, Inc., The Value of Pioneer's Preferences in Stimulating PCS Experimentation (Attachment A hereto). APC, Inc., which has 14 employees, is the managing general partner of the APC partnership. After APC, Inc. filed its first experimental application for PCS four years ago, it sought financial support for its efforts. In those early days when no financial institution would fund something so risky and visionary as PCS, The Post was willing to step up and invest in the venture. Eliminating the

It continued to hold out the preference policy by unanimously applying or affirming it nine different times, and as recently as September 23 when it said it would soon finally determine broadband PCS grants.^{5/} PCS innovators relied on these representations. In all good conscience, the Commission cannot now fail to honor its end of the bargain. It and the public have reaped the benefits of the contributions made by the pioneers; it cannot now pull back the preference awards. The race has been run; the Commission should not now withhold the trophies.

Equity and fairness are not the only principles that obligate the Commission to issue final PCS preferences. Retroactively altering the substantive rights of broadband PCS pioneers would be impermissible as a matter of law. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); Icore, Inc. v. FCC, 985 F.2d 1075, 1080-81 (D.C. Cir. 1993); 5 U.S.C. § 551(4). Congress has not given the Commission authority to retroactively eliminate preferences; in fact, Congress made clear that "nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new

preference policy retroactively for those who have devoted so much to creating a new PCS industry would crush the initiative of small entrepreneurs like APC and investors like The Post who might otherwise be willing to back such high-risk, spectrum-based ventures in the future.

^{5/} See Attachment B.

telecommunications service or technology."^{7/} Broadband PCS preferences should be finalized now, under existing rules.

2. The premise for reconsidering the preference policy is inapplicable to broadband PCS. Regardless of any prospective considerations, the facts show that APC has put on the public record the full results of its experiments and the details of its implementation plans, and did so at the Commission's invitation, embodied in its preference policy and in other explicit requests.^{8/} Having now been through this

^{7/} Omnibus Budget Reconciliation Act of 1993, §§ 6002(j)(6), (j)(6)(G). This provision originated in the Senate. See Conference Report, H.R. Rep. 103-213, 103d Cong., 1st Sess. 485 (1993). Although the Notice quotes House legislative history expressing neutrality toward preferences, it fails to note the history of Section 309(j)(6)(G) itself:

The FCC has been undertaking efforts to encourage the provision of new technologies and services by entrepreneurs and innovators. Consistent with the FCC's statutory obligations and its prior efforts in this regard, the Committee included language in this subsection which states that nothing prevented the FCC from awarding licenses to companies or individuals who make significant contributions to the development of a new telecommunications service or technology.

Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget, S. Rep. 103-36, 103d Cong., 1st Sess. 73 (1993).

^{8/} For example, two weeks before the Commission voted on the broadband PCS Report and Order, the FCC's Office of Plans and Policy and Office of Engineering and Technology requested APC to provide spectrum-availability data on various allocations in the 2100 MHz band. APC obtained data on all microwave users in that band across the United States and analyzed spectrum availability over the top 11 U.S. markets, working nights and weekends to provide the information in time for the Commission to make use of it. That submission formed the sole empirical basis for the Commission's decision to allocate PCS spectrum in the 2100 MHz band.

process, APC will have no advantage in competitive bidding, it will have no assurance of receiving a license, and it will not be able to launch PCS services at an early date. Nor is there any relation between our record of innovation and our ability to raise funds in the marketplace to outbid others.^{9/} In short, the broadband PCS pioneers will reap no advantage from their innovation if their preferences are withdrawn and they must compete in the auctions with newcomers who will benefit from their pioneering efforts.

3. Comparing the broadband PCS applicants with Mobile Telecommunications Technologies, Inc. ("MTel") compels action on broadband PCS preferences. The Commission has decided to effectuate, "as a matter of equity," the preference for MTel, the narrowband PCS pioneer. The only justification for a difference in treatment between narrowband and broadband PCS is that the FCC finalized MTel's grant on June 24, 1993, 47 days "before Congressional enactment of competitive bidding authority," whereas the date for finalizing the broadband PCS preference requests was or should have been September 23, 1993, 44 days after the effective date of the legislation.^{10/}

^{9/} As for the revisions to the preference procedures proposed in the Notice (paras 13-17), none would have altered our case for an award. Those procedural proposals are simply irrelevant to the merits of our grant.

^{10/} Notice, p. 8. Competitive bidding was just as much a part of the environment for narrowband PCS in June 1993, however, as it was for broadband PCS in September 1993. The order finalizing MTel's preference noted that auction legislation was pending and did not address licensee selection issues because auction legislation was being finalized.

But this is not the fault of the broadband PCS innovators. In fact, APC filed all relevant documents earlier than MTel. APC filed its experimental license applications on November 29, 1989 and May 3, 1990, while MTel filed its application on September 27, 1990. APC's applications were granted on February 22 and July 31, 1990, while MTel's application was granted on March 15, 1991. APC filed its preference request on July 30, 1991, while MTel filed its request on November 12, 1991.^{11/} The fact is that broadband and narrowband PCS are part of the same proceeding, and the Commission merely chose to resolve narrowband PCS issues before resolving broadband PCS issues.

It was the Commission that decided to act on MTel's preference application before APC's application. It was the Commission that violated its own rules and adopted a PCS Notice on July 16, 1992 without issuing a tentative decision on broadband PCS preferences, pulling the broadband PCS preference item from its agenda that very morning.^{12/} It was the Commission that decided to adopt a tentative decision on narrowband PCS preferences at that same meeting. It was the Commission that decided to delay a tentative decision on

^{11/} We have not analyzed the merits of Mtel's pioneer preference grant in depth, but from what we do know of it, we believe MTel to be deserving. And let it be emphasized that there is not a whiff in the Notice of any doubt as to the merit of APC's preference; the possibility of withholding a grant to APC and other broadband PCS pioneers is based solely on second thoughts about the policy itself.

^{12/} See 47 C.F.R. § 1.402(d) (1992).

broadband PCS preferences until October 8, 1992. It was the Commission that decided to adopt a narrowband PCS Report & Order on June 24, 1993 but delayed adoption of a broadband PCS Report & Order until September 23, 1993. It was the Commission that decided to remove broadband preferences from its September 23 agenda the afternoon before that meeting. In short, the only distinction between the broadband and narrowband PCS applicants is based solely on timing decisions that were in the Commission's own discretion.

4. The delay in finalizing PCS preference grants violates the Commission's own rules, is tardy in the extreme, and is causing injury to deserving innovators and the public.

When it adopted broadband PCS rules on September 23, 1993, the Commission's Rules obligated it to decide finally on PCS preferences at that time. 47 C.F.R. § 1.402(d) (1992). This rule makes eminent sense because it provided ample (some might say "excessive") opportunity for comment. APC filed its preference request on July 30, 1991; the Commission then entertained three rounds of comments and replies, made tentative grants, and entertained further pleadings.

By not finalizing the grant by September 23 and now reopening the question of whether broadband PCS pioneers should be even eligible for preferences, the Commission already has deprived APC of the benefit of starting PCS roll-out quickly. It will be delayed for months. APC was prepared beginning on September 24 to obtain rights to some 300 sites

in the Washington/Baltimore area for implementation of its PCS engineering design. It was ready to create new executive, management and technical jobs to undertake this and other tasks. It was ready to place PCS equipment orders, which would have jump-started the industry, focused design, standards, and interoperability issues, and allowed this country to begin to catch up with other countries that have stolen a march while we have deliberated.

The public in this market also would have benefited from early PCS service, and, nationwide, future PCS operators and subscribers would have benefitted from the opportunity to learn from APC's early construction and operating experiences and from its invigoration of the equipment market. Only prompt finalization of the preferences for broadband PCS pioneers can right the wrong and limit the ongoing damage caused by the Commission's action on October 21.

Respectfully submitted,

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The Value of Pioneer's Preferences in Stimulating PCS Experimentation

Monthly Requests

40

Cumulative Requests

200

35



30

150

25

125

20

100

15

75

10

50

5

25

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1989 1990 1991 1992 93

UK PCN
Policy
Statement

1st FCC
Meeting
on "PCS"

UK Awards
3 PCN
Licenses

PCS
NOI

PCS
Policy
Statement

PCS
NPRM

APPLICATIONS OF PREFERENCE POLICY

On January 16, 1992, the FCC tentatively granted a preference to Volunteers in Technical Assistance ("VITA") for a proposed low-earth orbit satellite service. See Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, Tentative Decision, 7 F.C.C. Rcd. 1625 (1992).

On February 13, 1992, the FCC unanimously affirmed its preference rules in general against challenges on reconsideration. See Establishment of Procedures to Provide a Preference to Provide a Preference to Applicants Proposing an Allocation for New Services, 7 F.C.C. Rcd. 1808 (1992).

On July 16, 1992, the FCC tentatively granted a preference to Mobile Telecommunications Technologies Corp. ("MTel") for narrowband PCS. See Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 F.C.C. Rcd. 5677, 5735-36 (1992).

On August 5, 1992, the Commission applied the policy to a proceeding to allocate spectrum for LEO services above 1 GHz, but tentatively determined that none of the parties requesting a preference met the FCC's pioneer preference standards. See Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, 7 F.C.C. Rcd. 6414, 6419-22 (1992).

On October 8, 1992, the FCC tentatively granted preferences to APC, Cox Enterprises, Inc. and Omnipoint Communications, Inc. for broadband PCS. See Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 F.C.C. Rcd. 7794, 7797-99 (1992).

On December 10, 1992, the FCC tentatively granted a preference to Suite 12 Group in the local multipoint distribution service ("LMDS") on December 10, 1992. See Rulemaking to Amendment Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 8 F.C.C. Rcd. 557, 565-66 (1993).

On January 14, 1993, the FCC finalized the VITA preference. See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum to the Fixed-Satellite Service and the Mobile-Satellite Service for Low-Earth Orbit Satellites, 8 F.C.C. Rcd. 1812, 1817-18 (1993).

On March 8, 1993, the FCC again unanimously affirmed its preference rules in general against challenges on reconsideration. Establishment of Procedures to Provide a Preference to Provide a Preference to Applicants Proposing an Allocation for New Services, 8 F.C.C. Rcd. 1659, 1659 (1993) (citing "strong public interest benefits" of the policy).

On June 24, 1993, the FCC finalized the MTel preference. See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, FCC 93-329 (adopted June 24, 1993, released July 23, 1993), app. pending, BellSouth Corporation v. FCC, No. 93-1518 (D.C. Cir.).